Mohamad Radwan Alami & Ors v RHB Bank Bhd and another suit

HIGH COURT (KUALA LUMPUR) — SUIT NO D3–22–186 OF 2007
HAMID SULTAN J
25 NOVEMBER 2011

Contract — Guarantee — Validity — Guarantors sued bank for alleged forgery/fabrication of guarantee — Agreement to guarantee not disputed — Dispute only that guarantee not properly documented — Whether guarantors proved fraud/ forgery — Whether guarantors abandoned fraud issue by settling principal's claim against them — Whether guarantors' claim time-barred

The plaintiffs in the two suits had guaranteed banking facilities granted by the defendant to two companies. The defendant sold its rights under the facilities and the guarantees to Danaharta Managers Sdn Bhd ('Danaharta') which commenced suits in the year 2001 to recover the amount owing under the facilities both from the companies and the plaintiffs. Danaharta's original claim of RM12m was negotiated down to RM3.5m and a consent judgment which involved the plaintiffs was recorded in 2009. In 2007, the plaintiffs filed the instant suits against the defendant for damages for fraud, alleging the signature of the first plaintiff in the guarantee was forged and that the contents typed in the guarantee had been fabricated. The plaintiffs did not deny guaranteeing the banking facilities but took issue with the improper documentation of the guarantee. The third plaintiff in both suits withdrew his action. The remaining plaintiffs sought a declaration that the guarantee was void. The first plaintiff, in addition, prayed for RM3.5m in damages. The second plaintiffs in both suits prayed for nominal damages of RM1 and costs saying they had not suffered any pecuniary loss arising from the Danaharta suits. The defendant's main contention was that the plaintiffs' claim was time-barred and that the plaintiffs had abandoned the issue of fraud when they entered into a settlement and consent judgment with Danaharta.

Held, dismissing the suits with costs:

(1) The plaintiffs, particularly the first plaintiff, did guarantee the facility and consequently their claim for loss and damage could not be sustained. They had not made out a case of fraud and/or forgery according to law (see para 14(g)).

(2) The evidence showed the plaintiffs had voluntarily signed the guarantee and/or blank guarantee. It was not their case that they never agreed to

provide any guarantee or had no nexus to the facility. They were saying the guarantee was bad because it had not been properly documented (see para 14(d)(h)).

(3) The plaintiffs had elected to abandon the issue of fraud when they entered into the consent judgment on the factual matrix of the instant case and the defences they raised in the Danaharta suits (see para 14(b)).

(4) It was unsafe to rely on the evidence of PW1 who purported to be a handwriting expert. He did not have the benefit of seeing the original guarantee. His evidence could not be accepted as expert evidence (see para 14(c)).

(5) The plaintiffs' claim was time-barred. They had notice of the claim under the guarantee as early as 2001. They ought to have commenced their action against the defendant within six years after knowing of the claim or after discovery of the alleged fraud/forgery. The plaintiffs could, with reasonable diligence, have discovered the alleged forgery as early as 2001 (see para 14(a)).

[Bahasa Malaysia summary

Plaintif dalam kedua-dua guaman telah menjamin kemudahan perbankan yang diberikan oleh defendan kepada dua buah syarikat. Defendan menjual hak-haknya di bawah kemudahan dan jaminan kepada Danaharta Managers Sdn Bhd ('Danaharta') yang memulakan guaman pada tahun 2001 untuk mendapatkan semula amaun yang terhutang di bawah kedua-dua kemudahan daripada syarikat dan plaintif. Tuntutan asal Danaharta sebanyak RM12 juta dirundingkan kepada RM3.5 juta dan penghakiman persetujuan yang melibatkan plaintif telah direkodkan pada tahun 2009. Pada tahun 2007, plaintif memfailkan guaman-guaman ini terhadap defendan bagi ganti rugi fraud, dakwaan tandatangan plaintif pertama dalam jaminan palsu dan bahawa kandungan yang ditaip dalam jaminan telah direka. Plaintif tidak menafikan menjamin kemudahan perbankan tetapi melihat isu tersebut sebagai dokumentasi jaminan yang tidak sepatutnya. Plaintif ketiga dalam kedua-dua guaman menarik balik tindakannya. Plaintif-plaintif yang lain memohon suatu deklarasi bahawa jaminan tersebut adalah tidak sah. Plaintif pertama, di samping itu, memohon untuk ganti rugi RM3.5 juta. Plaintif kedua dalam kedua-dua saman memohon untuk ganti rugi nominal RM1 dan kos dengan menghujahkan bahawa mereka tidak mengalami sebarang kerugian yang timbul daripada guaman Danaharta. Hujahan utama defendan adalah bahawa tuntutan plaintif terhalang oleh masa dan bahawa plaintif telah meninggalkan isu fraud ketika mereka memasuki penghakiman penyelesaian dan persetujuan dengan Danaharta.

Diputuskan, menolak guaman-guaman dengan kos:

(1) Plaintif, terutamanya plaintif pertama, telah menjamin kemudahan dan

akibatnya tuntutan mereka bagi kehilangan dan kerosakan tidak dapat dikekalkan. Mereka tidak mewujudkan kes fraud dan/atau pemalsuan mengikut undang-undang (lihat perenggan 14(g)).

(2) Bukti-bukti menunjukkan plaintif telah secara sukarela menandatangani jaminan dan/atau jaminan kosong. Bukanlah menjadi kes mereka bahawa mereka tidak pernah bersetuju untuk memberikan apa-apa jaminan atau tidak mempunyai kaitan kepada kemudahan tersebut. Mereka menghujahkan jaminan tidak kukuh kerana ia tidak didokumenkan dengan betul (lihat perenggan 14(d)(h)).

(3) Plaintif telah memilih untuk meninggalkan isu fraud apabila mereka memasuki penghakiman persetujuan pada matriks fakta kes ini dan pembelaan yang dibangkitkan dalam guaman Danaharta (lihat perenggan 14(b)).

(4) Ia adalah tidak selamat untuk bergantung kepada keterangan PW1 yang didakwa sebagai seorang pakar tulisan tangan. Dia tidak dapat melihat jaminan yang asal. Keterangannya tidak boleh diterima sebagai keterangan pakar (lihat perenggan 14(c)).

(5) Tuntutan plaintif terhalang oleh masa. Mereka mempunyai notis tuntutan itu di bawah jaminan, seawal tahun 2001. Mereka sepatutnya telah memulakan tindakan mereka terhadap defendan dalam tempoh enam tahun selepas mengetahui tuntutan atau selepas penemuan dakwaan fraud/pemalsuan. Plaintif mungkin, dengan usaha yang munasabah, menemui fraud yang dikatakan seawal 2001 (lihat perenggan 14(a)).]

Notes

For cases on validity, see 3(3) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 4842–4853.

Cases referred to

Abu Bakar Ismail & Anor v Ismail Husin & Ors & Other Appeals [2007] 3 CLJ 97, CA (refd)

Adorna properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng [2001] 1 MLJ 241, FC (refd)

Ambank (M) Bhd (Formerly known as Arab-Malaysia Bank Berhad) v Luqman Kamil Mohd bin Don [2012] 3 MLJ 1; [2011] 6 CLJ 277, FC (refd)

Ang Hiok Seng v Yim Yut Kiu [1997] 2 MLJ 45, FC (refd)

Banque Des Marfchands de Moscou v Kindersley [1951] Ch 112, CA (refd)

Boonsom Boonyanit v Adorna Properties Sdn Bhd [1997] 2 MLJ 62, CA (refd)

Chai Then Song v Malayan United Finance Bhd [1993] MLJU 128; [1993] 2 CLJ 640, HC (refd)

Charter Building Company v 1540957 Ontario Inc (Mademoiselle Women's Fitness & Day Spa) 2011 ONCA 487 (CanLII), CA (refd)

Chong Song @ Chong Sum & anor v Uma Devi a/p Kandiah [2011] 2 MLJ 585; [2011] 3 CLJ 1, CA (refd)
Chu Choon Moi v Tan Sri Ngan Sew Tin [1986] 1 MLJ 34, SC (refd)
Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Intervener) [2004] 2 MLJ 257, FC (refd)
Eon Bank Bhd v Hotel Flamigo Sdn Bhd [2005] 1 MLJ 712; [2005] 5 CLJ 253, HC (refd)
Formosa Resort Properties Sdn Bhd v Bank Bumiputra Malaysia Bhd [2010] 6 CLJ 481, FC (refd)
Junaidi bin Abdullah v PP [1993] 3 MLJ 217; [1993] 3 CLJ 201, SC (refd)
Kitchen v Royal Air Forces Association And Others [1958] 2 All ER 241, HL (refd)
Kum Wah Sdn Bhd v RHB Bank Berhad; United Frank Sdn Bhd & Ors (Third Parties) [2009] 9 MLJ 490; [2009] 1 LNS 634, HC (refd)
Lau Hee Teah v Hargill Engineering Sdn Bhd & Anor [1978] 1 MLJ 145, FC (refd)
Lim Tai Ming & Sons Credit Sdn Bhd v Lim Tuck Thien [2001] 1 MLJ 57; [2000] 4 AMR 4654, CA (refd)
Lim Yoke Kong v Sivapiran Sabapathy [1992] 2 MLJ 571; [1992] 1 CLJ (Rep) 184, SC (refd)
Lissenden v CAV Bosch Ltd [1940] AC 412, HL (refd)
Mohd Nasir bin Moidu v Lee Swee Kim [2011] 7 MLJ 606, HC (refd)
Nexus Communication Group v Michael Lambert [2005] EWHC 345 (refd)
Nina Kung v Wang Din Shin [2005] HKCFA 54 (refd)
Omega securities Sdn Bhd v Kok Fook Loy [2010] 9 MLJ 224; [2010] 8 CLJ 888, HC (refd)
Ong Ban Chai & Ors v Seah Siang Mong [1998] 3 MLJ 346, CA (refd)
'Pacific Vigorous', The [2006] 3 SLR 374, HC (refd)
Panglobal Insurance Sdn Bhd v Hassan Mohamed Nor & Lain [2005] 5 MLJ 183; [2005] 6 CLJ 511, HC (refd)
Paragon Finance Plc v DB Thakerar & Co [1999] 1 All ER 400, CA (refd)
Pengkalan Securities Sdn Bhd v Kemas Ria Sdn Bhd & Anor [2010] MLJU 1529; [2009] 1 LNS 909, HC (refd)
RHB Bank Bhd v Dominance Timber Industries Sdn Bhd & Ors [2009] 7 CLJ 654, HC (refd)
Sivapiran a/l Sabapathy v Lim Yoke Kong [1992] 2 MLJ 381, HC (refd)
Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777; [1995] 1 CLJ 15, FC (refd)
Tan Tak & Ors v Mahabuilders Sdn Bhd [2006] 4 MLJ 34, HC (refd)
United Dominion Trust Ltd v Western BS Romany [1976] 1 QB 513, CA (refd)
Wong Chop Saow v PP [1965] 1 MLJ 247 (refd)
Yap Seng Hock & Anor v United Asian Bank Bhd & Anor [1992] MLJU 30; [1994] 2 CLJ 319, HC (refd)
Yogambikai Nagarajah v Indian Overseas Bank [1997] 1 SLR 258, CA (refd)
Yong Tim v Hoo Kok Chong & Anor [2005] 3 CLJ 229, FC (refd)

Legislation referred to

Limitation Act 1953 ss 6(1)(a), 29

Al Sabri (R Ganapathy with him) (Al Sabri & Co) for the plaintiffs.
Andrew Chiew with (CB Loh with him) (Lee Hishammuddin Allen & Gledhill) for the defendant.

Hamid Sultan J:

[1] This is my judgment in respect of the two suits initiated by the guarantors to seek damages against the defendant bank in relation to purported forgery and/or fabrication relating to the bank guarantees, which resulted in the plaintiffs being liable to Danaharta Managers Sdn Bhd (Danaharta).

[2] The facts of this case are quite unusual. In this case the plaintiffs have given guarantees but alleged that the papers are not in order and in consequence the defendant bank which sold their rights to Danaharta and to which the plaintiffs have settled by consent order on irregular papers claiming that they are entitled to damages from the bank. In my view the real issue is that can they seek damages when in fact they have provided guarantees for the facilities?

[3] It must be noted that the defendant relies on 'inter alia' two defences which if found in their favour will entitle the plaintiffs' claim to be dismissed in *limine*. The said defences can be summarised as follows:

(a) the plaintiffs' claim is time barred under s 6(1)(a) of the Limitation Act 1953 in respect of Suit No 308; and

(b) the plaintiffs had by way of election abandoned the issue of fraud when the plaintiffs entered into a settlement with Danaharta by way of a letter of settlement dated 15 September 2009 and consent judgment dated 16 September 2009.

[4] It must also be noted that the learned counsel for the plaintiffs are limiting their case to a declaration that the guarantees are void and praying follows:

(a) wherefore the first plaintiff prays for damages of RM3.5m with interest at 8%pa from 12 March 2007 until full and final satisfaction and costs of this consolidated action; and

(b) the second plaintiffs, Mr Mohd Zin bin Su in Suit No 308 and Mr Mat Zuki bin Su in Suit No 186, have not suffered any pecuniary loss arising from the Danaharta Suits and pray for nominal damages of RM1 and costs of this action.

[5] The parties have relied on the following cases: *Lim Yoke Kong v Sivapiran Sabapathy* [1992] 2 MLJ 571; [1992] 1 CLJ (Rep) 184; *Sivapiran a/l Sabapathy v Lim Yoke Kong* [1992] 2 MLJ 381; *Kitchen v Royal Air Forces Association And Others* [1958] 2 All ER 241; *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62; *Adorna properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241; *Mohd Nasir bin Moidu v Lee Swee Kim* [2011] 7 MLJ 606; *Tan Tak & Ors v Mahabuilders Sdn Bhd* [2006] 4 MLJ 34; *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd* [2004] 2 MLJ 257; *Ang Hiok Seng v Yim Yut Kiu* [1997] 2 MLJ 45; *Ong Ban Chai & Ors v Seah Siang Mong* [1998] 3 MLJ 346; *Lau Hee Teah v Hargill Engineering Sdn Bhd & Anor* [1978] 1 MLJ 145; *Lim Tai Ming & Sons Credit Sdn Bhd v Lim Tuck Thien* [2001] 1 MLJ 57; [2000] 4 AMR 4654; *Nexus Communication Group v Michael Lambert* [2005] EWHC 345; *Lissenden v CAV Bosch Ltd* [1940] AC 412; *Banque Des Marfchands de Moscou v Kindersley* [1951] Ch 112; *Charter Building Company v 1540957 Ontario Inc (Mademoiselle Women's Fitness & Day Spa)* 2011 ONCA 487 (CanLII); *Nina Kung v Wang Din Shin* [2005] HKCFA 54; *Formosa Resort Properties Sdn Bhd v Bank Bumiputra Malaysia Bhd* [2010] 6 CLJ 481; *Omega Securities Sdn Bhd v Kok Fook Loy* [2010] 9 MLJ 224; [2010] 8 CLJ 888; *Yong Tim v Hoo Kok Chong & Anor* [2005] 3 CLJ 229; *Chu Choon Moi v Tan Sri Ngan Sew Tin* [1986] 1 MLJ 34; *Chong Song v Uma Devi a/p Kandiah* [2011] 3 CLJ 1; *Yogambikai Nagarajah v Indian Overseas Bank* [1997] 1 SLR 258; *Yap Seng Hock & Anor v United Asian Bank Bhd & Anor* [1992] MLJU 30; [1994] 2 CLJ 319; *Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217; [1993] 3 CLJ 201; *Wong Chop Saow v Public Prosecutor* [1965] 1 MLJ 247; *Kum Wah Sdn Bhd v RHB Bank Bhd*; *United Frank Sdn Bhd & 2 Ors (Third Parties)* [2009] 9 MLJ 490; [2009] 1 LNS 634; *Eon Bank Bhd v Hotel Flamigo Sdn Bhd* [2005] 1 MLJ 712; [2005] 5 CLJ 253; *RHB Bank Bhd v Dominance Timber Industries Sdn Bhd & Ors* [2009] 7 CLJ 654; *Panglobal Insurance Sdn Bhd v Hassan Mohamed Nor & Lain* [2005] 5 MLJ 183; [2005] 6 CLJ 511; *Pengkalan Securities Sdn Bhd v Kemas Ria Sdn Bhd & Anor* [2010] MLJU 1529; [2009] 1 LNS 909; *Chai Then Song v Malayan United Finance Bhd* [1993] MLJU 128; [1993] 2 CLJ 640; *United Dominion Trust Ltd v Western BS Romany* [1976] 1 QB 513; *Ambank (M) Bhd v Luqman Kamil Mohd bin Don* [2012] 3 MLJ 1; [2011] 6 CLJ 277; *Tan Sri Khoo TeckPuat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777; [1995] 1 CLJ 15; *The 'Pacific Vigorous'* [2006] 3 SLR 374; *Paragon Finance Plc v DB Thakerar & Co* [1999] 1 All ER 400; *Abu Bakar Ismail & Anor v Ismail Husin & Ors & Other Appeals* [2007] 3 CLJ 97.

BRIEF FACTS

[6] There are two suits by the plaintiffs and at the commencement of the proceedings the third plaintiff has withdrawn the action in both the suits with no order as to costs. The defendant has given facilities to two companies, namely Laser Age Sdn Bhd (Laser Age) (Suit No 308) and Alami Corp Bhd

(Alami) (Suit No 186). The facilities were backed by guarantees, given by the respective plaintiffs, who say the said guarantees were forged and/or fabricated. The rights under the banking facilities inclusive of the guarantees were vested in Danaharta.

[7] Danaharta brought suits to recover the said facilities sum from Laser Age and Alami and the guarantors by two suits as early as the year 2001. The said claim was for more than RM12m but it was settled for RM3.5m by consent terms dated 16 September 2009 (see encl 56, pp 155–157).

[8] The consent term, inter alia, says:

> In default of any one instalment of payment under (i) or (ii) above on the relevant due date, the entire sums outstanding in both the above suits:
>
> (a) amounting in total to be RM12,608,021.46 as at 30.8.2009;
>
> (b) with interest continuing to accrue thereon at 2% above the base lending rate per annum from 1.9.2009 until final payment; and
>
> (c) the taxed or agreed cost of both suits
>
> shall be immediately due and payable by, and enforceable against, all defendants in both the above suits jointly and severally, less any amounts paid by the defendants under (i) and/or (ii) above as at the date of default, notwithstanding any position or defence the defendants may have had or taken in either or both the above suits.

[9] Earlier to the consent judgment the plaintiffs have informed Danaharta by letter dated 14 September 2009 the terms of the offer, inter alia, as follows:

> This offer is made in good faith and as you would kindly appreciate is not an admission of liability on our part as we intend to continue our action against RHB Bank to recover damages for causing us this loss.

[10] The plaintiffs have filed this suit against the defendants in 2007 to seek damages. The main complaint in respect of Suit No 308 is that: (i) the first plaintiff's signature is forgery and the contents typed in the guarantee etc, is fabricated; and (ii) and the complaint in respect of Suit No 186 is mat guarantee is fabricated. In essence the plaintiffs' claim is premised on fraud.

[11] The defendants' defence, inter alia, (i) in respect of Suit No 308 other than limitation defence is that the plaintiffs agreed to and executed the guarantee and the details in the said guarantee were inserted to before they were forwarded to the plaintiffs for execution and the defendant witness had verified the signatures; (ii) in respect of Suit No 186 the plaintiffs agreed to execute the

said guarantee and the defendant witness had verified the signatures.

PRELIMINARIES

[12] Five witnesses gave evidence for the plaintiffs and two for the defendant. The main witness for the plaintiff was the first plaintiff (PW2) and his evidence was severely challenged and there was much contradiction in relation to the contemporaneous documents as well as evidence in court. PW2 does not in principal dispute that he has guaranteed the facilities and signed several bank guarantees in blank; his complaint is related to the nature of documentation as well as the purported signature of his in Suit No 308. The other plaintiffs had given evidence to state that they are only nominees for PW2.

[13] PW1 who claims himself to be certified fraud examiner did not have the benefit of seeing the original guarantees, which was never produced for his scrutiny. The defendant witness's evidence was consistent with the documentary evidence and despite severe cross-examination was not shaken,

[14] I have heard the evidence, read the documents and submission of the parties in detail. I am grateful to the learned counsel for having placed a detailed submission on the facts, evidence and the law. It will serve no useful purpose to repeat the same save to deal directly with the core issues. I take the view the plaintiffs' claim in both the suits must be dismissed. My reasons,inter alia, are as follows:

(a) I agree with learned counsel for the defendant that the plaintiffs' claim is time barred. The plaintiffs had notice of the claim under the guarantee as early as the year 2001. If the plaintiffs' argument is that they have given no guarantees at all then they ought to have commenced the action against the defendant within six years after coming to the knowledge of the claim. If their argument is that the guarantees were forged and/or fabricated again they ought to have commenced within six years as law specifically requires them and places the burden on them to act with reasonable diligence. This is specifically stated in s 29 of the Limitation Act 1953 which reads as follows:

> Where, in the case of any action for which a period of limitation is prescribed by this Act, either:
>
> (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
>
> (b) the right of action is concealed by the fraud of any such person as aforesaid; or
>
> (c) the action is for relief from the consequences of a mistake,

A the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:

Provided that nothing in this section shall enable any action to be brought to recover, or enforce any charge against, or set aside any transaction affecting, B any property which —

(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been C committed; or

(ii) in the case of mistake, has been purchased for valuable consideration, subsequently to the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.

D

That is to say that in the instant case the plaintiffs to rely on the section ought to have acted from the time the notice of demand was issued to avail the protection in s 29. It is trite that the plaintiff bears the burden of proving that they could not have discovered the fraud with due diligence. Support for the proposition is found E in a number of cases. In *Paragon Finance Plc* the court made the following observations:

In my judgment this reasoning is misconceived. The question is not whether the plaintiffs should have discovered the fraud sooner; but whether they could with F reasonable diligence have done so. The burden of proof is on them. They must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take. In this context the length of the applicable period of limitation is irrelevant. In the course of argument May LJ observed that reasonable diligence must be measured against some standard, but that the six-year limitation period did not provide the relevant G standard. He suggested that the test was how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency.
It is my finding that the plaintiffs could have with reasonable diligence discovered the forgery (if any) as early as the year 2001 and in consequence the plaintiffs' H action must be dismissed in *limine*.

(b) I also find much merit in learned counsel submission that the plaintiffs had by way of election abandoned the issue of fraud when the plaintiffs entered consent judgment on the factual matrix of the instant case and the defences raised by the plaintiff in the Danaharta suits. In *Nexus* I *Communication Group* the distinction between common law and equitable election is stated as follows:

44 Election at common law occurs where a person has two inconsistent rights, only one of which can be exercised. Once he exercises that right he

cannot exercise the inconsistent right. Likewise, in the case of remedies, the boundary between the two being often difficult to distinguish.

45 Election in equity means that a party cannot both accept an instrument or judgment and reject it. He cannot take a benefit under the instrument or judgment without taking the accompanying burden. By analogy, this principle also extends to litigation where a party succeeds in obtaining judgment on the basis of a particular contention and cannot then resist judgment based on that same contention, where that would be inequitable. The inequity here is once again based on the benefit/burden principle: having taken the benefit of the judgment on a particular basis the party must accept the burden of the judgment for the other relevant party on the same basis.

46 On the other hand, except where this would be contrary to established equitable principles, any party to a legal dispute, before or during litigation, can put forward inconsistent arguments prior to judgment. One inconsistent argument does not prevent reliance on any other inconsistent arguments except where the common law or equitable doctrines of election or some other doctrine applies. This inconsistency is not of itself a reason for invoking either the common law or the equitable doctrines of election.

(See *Lissenden* at p 412 where the expression 'approbate and reprobate' was discussed and its scope explained by Viscount Maugham).

(c) it is unsafe to rely on the evidence of PW1 who purports to be handwriting expert and who also did not have the benefit of seeing the original guarantee. In this respect I agree with the submission of learned counsel for the plaintiffs, that PW1's evidence should not be accepted as an expert's evidence;

(d) it must be noted in the instant case evidence will show that the plaintiffs have signed guarantees and/or blank guarantees for the purpose of facility and it is not a case per se that the plaintiffs never agreed to provide any guarantee or has no nexus to the facility. In fact the facility was based on guarantee to be provided by the plaintiffs; in consequence it is quiet difficult to appreciate how the plaintiffs would have suffered a loss purportedly on a void guarantee in writing. It is difficult to say that the guarantees were forged and/or fabricated as alleged by the plaintiffs when there was evidence to show they have voluntarily signed guarantees even though it was asserted they were blanks;

(e) in addition it must be noted that Danaharta as early as the year 2001 has served a demand notice and filed a claim against the principal and the guarantors. If the position of the plaintiffs is that they have not guaranteed the facilities they would have taken objection to the demand letter as well as the suit and lodged a police complaint and proceeded to take action against the defendant. The complaint by the plaintiff is more related to that the 'papers were not in order' rather than the fact that the

plaintiffs in particular the first plaintiff did not guarantee the facility transaction. On such facts it is difficult to fathom how the first plaintiff will have suffered any loss or damage, when other plaintiffs were his nominees only, and evidence was given to say that first plaintiff would have to indemnify the other guarantors for the guarantees they have executed;

(f) it must be noted that the expert evidence (PW1) in this case does not satisfy the rudimentary requirements which need to be established in respect of the subject matter of claim for even to consider the opinion in the right perspective. In addition PW1 did not have the benefit of seeing original documents complained of;

(g) I have given much thought to the submission of learned counsel for the plaintiffs which attempts to show that there are a number of discrepancies relating to the guarantees. However, the overriding consideration in this case is not whether the papers relating to the guarantee and the guarantee itself is valid but whether the fact that the plaintiffs in particular the first plaintiff did give the guarantee and in consequence did not suffer any loss. It is my finding that the plaintiffs and in particular the first plaintiff did give the guarantee for the facility and in consequence their claim for loss and damage cannot be sustained. In addition I agree with learned counsel for the defendant the plaintiffs have not made out a case of fraud and/or forgery according to law; and

(h) in the instant case the plaintiffs as guarantors are attempting to say the guarantee is bad in law because it has not been properly documented. However, the fact remains that the plaintiffs have guaranteed the facilities if that is not the case they would have objected as early as the year 2001.

[15] For the stated reasons above I take the view that both the plaintiffs' suits must be dismissed with costs. The first and second plaintiffs to pay the defendant costs in the sum of RM30,000. The defendant to pay the allocatur fee before extraction of order for costs. The deputy registrar to issue certificate for the allocatur.

[16] I hereby order so.

Suits dismissed with costs.

Reported by Ashok Kumar